No. 18549

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL RIDDELL ELLIS,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

APPELLANT'S OPENING BRIEF

HONORABLE FRED M. TAYLOR,
United States District Judge

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of the law firm of
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Pocatello, Idaho
ATTORNEYS FOR APPELLANT

Sylvan A. Jeppesen, U. S. District Attorney

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CASES

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IN THE UNITED STATES COURT OF APPEALS

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- - -

EARL RIDDELL ELLIS,)
)
Appellant)
)
-vs-)
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UNITED STATES OF AMERICA,)
)
Appellee.)

Appeal from the United States District Court of the Eastern Division of Idaho

APPELLANT'S OPENING BRIEF

TO THE HONORABLE CHIEF JUDGE AND THE HONORABLE ASSOCIATE JUDGES OF THE ABOVE ENTITLED COURT:

JURISDICTION

This Honorable Court has jurisdiction of this cause by reason of a timely Appeal taken from judgment of Conviction on four counts charging violation of Title 18 USC Section 2314 by aiding and abetting the commission of the offense proscribed by this section and Under Title 18 USC. Section 2. Appellant was also convicted under a fifth count of

conspiracy to do the acts charged in the first four counts under Title 18 USC 371. This Honorable Court extended Appellant's time for filing Appellant's Opening Brief to May 10th, 1963 and the same has been timely served and filed within the extended time.

STATUTES INVOLVED

Title 18, USC Section 2314 which reads in pertinent part as follows:

> "* * *Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> * * *Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18 USC Section 2 which reads as follows:

> "Principals
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
> (b) Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States is also a principal and punishable as such."

Fifth Amendment to the Constitution of the United States, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States, which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 7 (c) Federal Rules of Criminal Procedure, which reads:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 12 (b) (2) (3) Federal Rules of Criminal Procedure, which reads as follows:

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS. (2) Defenses and objection based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense of objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) TIME OF MAKING MOTION. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 27 Federal Rules of Criminal Procedure which reads as follows:

"An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Rule 44, Federal Rules of Criminal Procedure which reads as follows:

"(a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied

with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivison in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

STATEMENT OF PLEADINGS AND MOTIONS.

The Appellant in this case was indicted by the Grand Jury on four counts charging violation of 18 USC 2314 and one count of conspiracy under 18 USC 371 in which it was charged that the acts complained of in the first four counts were done as a part of a conspiracy between the defendant and the Government's Chief witnesses thus constituting a fifth offense.

Each of the first four counts sets out in its first paragraph that on a certain date one Le Roy Simonson cashed a false and forged American Security Express Company Money Order in Idaho

drawn on the Pacific State Bank, Windsor Hills Branch, Los Angeles, California, thus placing a false or forced security in interstate commerce. The second paragraph implicates Appellant by alleging that he did feloniously aid and abet the commission of the crime charged in the first paragraph. The indictment, therefore charges the Appellant as a principal under 18 USC 2.

The fifth count charges the Appellant with conspiring with said Simonson and Simonson's wife Nettie Ellen to transport in interstate commerce the securities described in the first four counts. Six separate overt acts are alleged to have occurred pursuant to the conspiracy. The indictment is set forth Vol. I Transcript pp. 6-10

The Appellant moved to dismiss each count in the Indictment upon the grounds that the same did not conform to the requirements as required by the Constitution of the United States in Amendments V and VI thereof and failed likewise to show any facts whatever as to the means or methods used by the Appellant in aiding, abetting, counselling,

and procuring the commission of the alleged crime by Simonson as required by Rule 7 (c) and Rule 12 (b) (2) (3). As to count Five the Motion contained in addition to the above grounds. B. That the overt acts charged did not show any conspiracy combination or agreement to violate any Federal Law and C. That the value of the securities alleged to be the subject of the conspiracy was less than $5,000.00. Motion is set forth in full, Vol. I pp. 11-12 Transcript of Record.

At the time of the Arrignment on February 14th, 1962 the Appellant further filed a Demand for Bill of Particulars. Vol 1 p. 15. At the Arraignment the Court denied the Motion To Dismiss but did not rule on the Demand for Bill of Particulars until October 10, 1962, a few moments before the trial of the cause with the jury commenced. Vol 1 p. 89. Transcript.

At the time of the Arraignment February 14, Appellant pleaded "Not Guilty" to all five counts.

As a collateral matter prior to the trial and at the arraignment the Appellant had demanded the return of his books and records which had been taken by the Grand Jury. Vol I pp 16-23. His Motion and Demand were denied by the Court also just before the trial began on Oct 10, 1962, Transcript. p. 89. The Government was directed in open court to permit the

Appellant and Counsel to inspect these records "during the trial". These records were voluminous and the Order of the Court at this late date with all the pressure of the trial was inadequate, ineffective and useless to Appellant and his counsel. These records were important in the matter of fixing dates and establishing the defense of Appellant as will appear later herein.

STATEMENT OF FACTS

Appellant was convicted upon four counts of aiding, abetting, counseling, inducing, and procuring the unlawful transportation in interstate commerce of forged and falsely made securities and also upon a fifth count of conspiring with two other persons in the transportation of forged and falsely made securities in interstate commerce. (18 USC 2314 and 2) (18 USC 371).

The persons involved in the alleged conspiracy included LeRoy Simonson, Nettie Ellen Simonson, his wife, and the Appellant Earl Riddell Ellis. LeRoy Simonson previous to the time of the trial of the Appellant entered a plea of guilty to two counts of transporting in interstate commerce forged securities and was sentenced by the court. Nettie Ellen Simonson, his wife also previous to the time of trial of the Appellant entered a plea of guilty to one count

of transporting in interstate commerce forged securities, sentenced and placed on probation by the court.

The government primarily based the case against the Appellant upon the uncorroborated testimony of the previously mentioned co-conspirators and accomplices, whose stories were conflicting.

The conflicts between the stories told by Simonson and his wife are so many that it is only possible to call attention in this Brief to a few of the outstanding ones. For convenience of the Court and Counsel we have devised a table with references to the Transcript to show the impeached and incredible nature of the testimony upon which this conviction is based.

The Government's theory of the case at the trial was that Simonson and his wife came to Pocatello, Idaho, early in August of 1961. That they wanted to trade a 1954 Buick in for a better one at Appellant's Used Car Lot. That they discussed car trades and that Ellis told Simonson he would show him how to pay for a better car. That Ellis arranged for an apartment across the alley from his lot to rent to Simonson and then took Simonson for a ride to some point (not identified) in the vicinity

of Pocatello and that Appellant told Simonson to pick up a package which he says contained American Security Express Company Money Orders (Tr. Vol Two p. 20). They then returned to the Used Car Lot and to the apartment and Simonson displayed the package to his wife. Simonson then asserted that he wanted identification to assist him in cashing the money orders. He also stated that the parties agreed that they would divide the proceeds of the sale of the money orders. Simonson claimed that Ellis furnished to him an Idaho Liquor License made out to Demetrio Baca and which Simonson never used for any purpose. (Tran. Vol 2 pp. 24-25, Plaintiffs' Exhibit 1). Simonson had signed a contract for the purchase of a 1957 Buick Automobile and on the same day left for Ogden, Utah. There he obtained his own identification in the form of a Utah Liquor Permit under the name of Orville Davis and returned to Pocatello. An alleged conversation was had between Ellis, Simonson, and Mrs. Simonson about further identification and Simonson claimed that he received Army Discharge papers from Ellis for a man named Hugo Keller . Plaintiffs' Exhibit 2 was a completely unverified,uncertified copy of purported discharge papers of Hugo Keller allegedly on record in North Dakota. This highly prejudicial evidence

Was admitted by the Court over Appellant's strenuous objections. (Trans. Vol II pp. 30-32).

The Prosecution laid great store on a telegram (Exhibit #21) in which Simonson sent $300.00 from Grand Junction, Colorado, to Pocatello, Idaho as proof of the conspiracy but under the original contract for the purchase of the Buick by Simonson from Ellis, Simonson was required to make a $300.00 payment on August 15th, 1961. (Defendant's Ex. 16 Trans. Vol II pp 190-191) It is also to be noted that this contract was dated August 9th 1961, before Simonson left to cash money orders.

Simonson cashed money orders as described in the indictment and using his own false identification. Mrs. Simonson filled in the names of the fictitious parties (Keller, Davis etc.) after being "slapped around" by Simonson.

Simonson's testimony as to his life's history of felony convictions commences on p. 88 Vol II Transcript and continues to p.92. It starts with reform school in Oklahoma when he was in his teens for a year; Next he spent four years in the Colorado penitentiary; He is next found in the Idaho penitentiary on a conviction for burglary and served

eighteen months and then escaped. He was convicted of burglary in California and served a year at Folsom and then was returned to Idaho on the escape charge and served additional time in the Idaho penitentiary. He was allowed to plead "Guilty" on two counts and the others were dismissed, and he was convicted on the first two counts of the Indictment for the same violations charged against Appellant. Two other counts were dismissed. He was sentenced to serve three years to run concurrently. Mrs. Simonson pleaded "Guilty" to one charge not included in any of the counts against Appellant and was placed on Probation.

The Motives of Simonson and Mrs. Simonson in testifying against Appellant are shown by the testimony of William Booton and Douglas C. Johnson. The expectation of a lighter sentence for Simonson and probation for Mrs. Simonson stands out like a lighthouse beam in this case.

In regard to the use of ficticious automobile license plates and the conjecture as to who attached them to the automobile used by the Simonson's the Affidavit of Patrick Allison supporting the Motion for New Trial does clarify the question somewhat.

The testimony of William Booton and Douglas C. Johnson both cell mates of LeRoy Simonson during his incarceration in the County Jail at Pocatello, Idaho is to the effect that defendant was "framed" by the Simonsons for reasons of Simonson's prospect of leniency, prospect of leniency for Mrs. Simonson, possible resentment over the fact that defendant had withdrawn bond on the fugitive warrant for Mr. Simonson from Montana and possible resentment for defendant's failure to aid him.

Mr. Booton testified:

BY RICHARD BLACK:

Q. What did Simonson say?
A. He said he was going to get him.

Q. What did he say?
A. Over the bond, he was going to get him---over the bond.

Q. Did he say anything about Mr. Ellis' wife.
A. Yes. He figured she had turned him in to the FBI when Mr. Ellis was gone.
Trans. Vol 3. Ls 16-23 p. 364

The record also contains the testimony of Mr. Johnson regarding conversation between Mr. Simonson and his wife during his incarceration at Pocatello, Idaho.

THE WITNESS: Well, he wanted his wife to sign the statement that he had received the money orders from Earl Ellis and to tell the authorities that he got these orders in a card game they had at Earl's

house at one time. He didn't specify a date, and his wife seemed reluctant to do it. She cried a little and he pleaded with her to do it and said that if she didn't testify that was for him, it was possible that he was due for twenty years in prison from the Federal Government.

Trans. Vol 3 Ls 6-15 p.393.

SPECIFICATIONS OF ERROR

I.

The trial court erred in overruling Appellant's Motion to Dismiss the Indictment because all five counts are fatally defective in failing to state any facts as to how the Appellant participated in the Commission of the crimes charged.

II.

The trial court erred in failing to rule on the Demand for Bill of Particulars (filed on February 14, 1962 at the time of the arraignment) until a few moments before the trial commenced on October 10, 1962, and erred in denying Appellant the Bill of Particulars.

III.

The trial court erred and abused his discretion by failing to require the Respondent-United States to specify any facts or basis for the general conclusions stated in the indictment.

IV.

The trial court erred in refusing to return the books and records of Appellant to him in time to use them in the preparation of Appellant's case.

V.

The trial court erred in denying Appellant's Motion for an Acquittal at the close of the Respondent's Case.

VI.

The trial court erred in denying Appellant's Motion for an Acquittal at the close of all of the evidence.

VII.

The trial court erred in denying particularly the Motion for Acquittal as to Count Four because the evidence affirmatively showed that the offense could not possibly have been committed in the manner and at the time charged in that Count.

VIII.

The trial court erred in denying Appellant's Motion in Arrest of Judgment made on all of the grounds stated therein.

IX.

The court erred in overruling Appellant's Motion for New Trial.

X.

The court erred in admitting plaintiffs' Exhibit 2, which purported to be a photo-copy of discharge papers of one Hugo Keller on file in North Dakota. This Exhibit was not identified, certified, or authenticated. Transcript Vol Two pp.30-31. Counsel for Appellant made the following objection at pp.31-32.

> "MR. JOHN BLACK: If the court please, we object to this document on the ground that it is incompetent, errelevant, and immaterial and no proper foundation has been laid for its admission, and it doesn't appear to be a certified copy. It has no seal--nothing to show its verity in any way, shape, or form, and if it is a true copy of some document of record in the State of North Dakota it would have been a simple matter to obtain a Certified Copy.
>
> MR. BAKES: Our answer, Your Honor, having established that the original was destroyed this is the best evidence and the witness has identified it, and, therefore, I think that the foundation is laid for the admission of the document in evidence. The fact that it could have been certified---
>
> THE COURT: I don't want to hear anymore argument. I understand the problem.
>
> MR. JOHN BLACK: I want to add one more thing; it is not the best evidence available because it is not certified.

XI.

The court erred in failing to instruct the jury properly as to what consideration should be given to the testimony of accomplices in that

(a) In giving an instruction on accomplices (Trans. Vol IV. p. 482) the court used these words:

> "An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care."

(b) In failing to give Appellant's Requested Instructions numbered 1,4, and 5, on accomplices.

(c) In failing to give Appellant's Requested Instruction numbered 2, especially because the theory of the Appellant's Defense was that he merely sold a car to Simonson and knew Nothing of the money orders.

XII.

The court erred in imposing a much more severe sentence on Appellant than on either of the Simonsons in spite of previous criminal history of Simonson and no previous felony conviction of Appellant.

I.

The Fifth and Sixth Amendments to the Constitution of the United States require that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment which shall inform such person of the nature and cause of the accusation

Constitution of the United States
Amendments Five and Six

II.

(a) The Federal Rules of Criminal Procedure require that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. Mere legal conclusions are not sufficient. This point applies to the entire indictment.

Rule 7 Federal Rules Criminal Procedure.

Current v. U. S. (CCA 9th 1961) 287 F(2) 268
Russell v. U. S. (1962) 369 U. S. 749 8L Ed (2) 240.

(b) It is not sufficient to charge an offense in the words of the statute creating it, unless such words themselves, without uncertainly, set forth all essential elements to constitute the crime intended to be punished.

U. S. v Simplot (DC Utah 1961) 192 F. Supp. 734

Russell v. U. S. (Supra) (U. S. Sup. Ct.1962)

Meer v. U.S. (CCA 10th) 235 F(2) 65

Wright v. U. S. CCA 6th) 243 F(2) 546

Ornelas v. U. S. CCA 9th) 236 F(2) 392

U. S. v Debrow (1953) 346 U.S. 374, 98 Led 92.

III.

The court for cause may direct the filing of a Bill of Particulars.

United States v Tornabene 222 Fed(2) 875

Clay v. United States 218 Fed (2) 483.

Current v. U. S. (CCA 9th) 1961 287 F(2) 268

Simpson v. U. S. CCA 9th 1960) 241 F(2) 222

IV.

It is no answer to a request for a Bill of Particulars for the government to say:

"The defendant knows what he did and therefore has all the information necessary."

Since the defendant is presumed to be innocent he is presumed to be ignorant of the facts on which the charges are based.

Russell v. U. S. (1962) 369 U. S. 749
8 L. Ed (2) 240

Cooper v. U.S. (CCA 9th 1960) 282 F(2) 527

Rodella v. U. S. (CCA 9th 1960) 286 F(2) 306

U. S. v Smith D.C. Mo 1954 16 FRD 372

U. S. v. Grieco D. C. N.Y. 1960 25 FRD. 58

Thomas v. U. S. 1 CCA 8th 1951 188 F(2) 6.

U. S. v Baker Brush Co.(DC N.Y 1961)197 F. Supp 922.

U. S. v. Bentvena (DC N.Y. 1960) 193 F. Supp 485

U. S. v. Strauss (CCA 5th) 283 F (2) 155

V.

It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.

Russell v. U. S. 8 L. Ed (2) 240 (Advance Sheet)

U.S. v. Cruikshank 92 U.S. 542 23 L.Ed 588,593

An indictment not framed to appraise the defendant "with reasonable certainty", of the nature of the accusation against him is defective although it may follow the language of the statute.

Russell v. U.S. 8 L.Ed (2) 240

U. S. v. Simmons 96 U.S.360 24 L.Ed 819

U.S. v. Carll 105 U.S. 611 26 L Ed 1135.

Hernandez v. U.S. 300 F(2) 114 (9th 1962)

VI.

It was error for the Court to refuse to refuse to allow Appellant access to his books and

records except during the trial.

Rule 16. Federal Rules of Criminal Procedure

VII

Rule 27 of the Rules of Criminal Procedure by reference adopts Civil Rule 44. Rule 44 requires proper authentication of documents by the legal custodian of the record. Plaintiffs' Exhibit 2 was admitted without complying with any requirements as to identification or authentication and was highly prejudicial.

Rule 27 Federal Rules of Criminal Procedure

Rule 44 Federal Rules of Civil Procedure

Passantino v. U.S. (CCA 8th) 32 Fed (2) 116

Mullican v. U.S. 252 Fed (2) 398

Wright v. MCDonald (MO) 233 SW(2) 19

Schuyler v. United Air Lines 94 F. Supp 472

The appellant did not have a fair trial for all the reasons mentioned above and in addition was based upon the uncorroborated testimony of accomplices, who were otherwise impeached and discredited.

McLendon v. U.S. (CCA MO) 19 Fed (2) 465

Sykes v. U.S. 20 Fed 909

Ambrose v. U.S. 280 Fed (2) 766

Ardett v. U.S. 265 Fed (2) 837

Claypole v. U.S. 280 Fed (2) 768

Caminetti v. U.S. 242 U.S. 470, 495, 61 L Ed 442.

Holmgren v. U.S. 217 U.S. 509 54 L.Ed 861

VIII.

Where the trial court has imposed an excessive sentence, the Court of Appeals has jurisdiction to modify the same. This is particularly true when contrasted with lighter sentences imposed on hardened criminals involved in the same offense.

U.S. v. Wiley (CCA 7th 1960) 278 Fed (2) 500

Yales v. U.S. 356 U. S. 363 2 L.Ed (2) 837
89 ALR 295 , 29 ALR 313.

SUMMARY OF ARGUMENT

This Argument may be summarized briefly in the following points.

I.

INDICTMENT FATALLY DEFECTIVE

The indictment and all five counts should have been dismissed on Motion timely filed for failure to comply with the minimum requirements of the Constitution of the United States and with Rule 7 of the Federal Rules of Criminal Procedure. The error of the trial court in denying the Motion to Dismiss, Motion for Acquittal at close of Government's case, Motion for Acquittal at the close of all the evidence and Motion in Arrest of Judgment as covered in various ways by Specifications of Error numbered I, V, VI, VII, VIII, and IX.

II.

DEMAND FOR BILL OF PARTICULARS

The Appellant's Demand for a Bill of Particulars should in any event have been granted because the Appellant was not advised by the Indictment as to how, when, where, or in what way he was charged to have aided and abetted, the commission of the crimes with which he was charged. Appellant was presumed by law to be innocent of the charges made and hence to be ignorant of the circumstances constituting the

offense. Specifications of Error numbered II and III are directed against the Court's refusal to require the Respondent to state the facts. It is not sufficient to charge an offense in the words of the statute creating it, unless such words themselves without certainty, set forth all essential elements to constitute the crime intended to be punished. An indictment not framed to appraise the defendant "with reasonable certainty" of the nature of the accusation against him is defective even though it follows the language of the statute.

III.

ERRORS BEFORE AND AT TRIAL CONCERNING EVIDENCE

(a) It was prejudicial error to deprive the appellant of access to his books and records prior to the trial. Specification of Error number IV.

(b) It was highly prejudicial to admit in evidence Plaintiffs Exhibit 2 which purported to be a photocopy of discharge papers of one Hugo Keller supposedly on file in North Dakota. This exhibit had no identification, authentication, verity, or probity whatever but was introduced by Respondent and relied upon as a strong circumstance against Appellant during the trial and especially during Argument of Counsel. Specification of Error numbered X.

(c) The Court failed to strongly instruct the jury as to the caution and distrust with which to regard the testimony of accomplices LeRoy Simonson and Nettie Ellen Simonson especially in view of the conflicts, inconsistencies, and unreliability of their testimony as given and the impeachment of LeRoy Simonson. The testimony of these witnesses when taken together is so incredible as to destroy belief and is at best a most fragile platform upon which to base a conviction and long term of imprisonment for the Appellant together with a heavy fine.

IV.

EXCESSIVE SENTENCE

It is the contention of the Appellant that if all of the evidence of the Simonsons and the Respondent is taken as true for the purpose of this Argument (which we by no means concede), the Appellant as convicted had the least to do with the commission of the crimes charged. Yet because he pleaded "Not Guilty" and stood trial he was sentenced to the most severe sentence of all the defendants. His defense was not frivolous and he has maintained his innocence throughout at the expense of the loss of all of his possessions and his final descent into bankruptcy during the pendency of this appeal. He had no previous record of convictions and an excellent record in the service of his country including an

Honorable Discharge from the service. He had been in business for many years in Pocatello, Idaho. He was sentenced to five years imprisonment and to pay a fine of $1000.00 on each of the five counts upon which he was convicted. By comparison, Nettie Ellen Simonson was placed on probation. LeRoy Simonson was shown by his own testimony to have been convicted of felonies at least four times and to have spent a great portion of his adult life confined in prison, ranging through Oklahoma, Colorado, Idaho and California. He was sentenced to three year

This Court has jurisdiction to correct this unequal and excessive sentence.

CONCLUSION

These convictions of Appellant, then, in the humble opinion of Counsel for Appellant should be reversed for the following reasons.

1. The Indictments were fatally defective.

2. The Demand for a Bill of Particulars should not have been denied.

3. The Court committed prejudicial error:

   (a) In depriving appellant of his books and records.

   (b) In admitting in Evidence Plaintiffs Exhibit 2.

   (c) In failing to impress upon the jury the unreliability and lack of probity of the accomplice testimony.

4. The sentence imposed by the trial judge was excessive and severe especially when compared

In this case, it might be said by way of opening, that it got off on the wrong foot from the start.

Simonsons were indicted, plead "Guilty" and were sentenced. In the meantime, the Grand Jury indicted Appellant herein for aiding and abetting the Simonsons on the same counts under 18 USC 2. The manner in which these counts were phrased is best illustrated for the convenience of Court and Counsel by setting out Count One in full from the Indictment.

Count One
(Vio. 18 USC 2314)

That on or about August 10, 1961, in the Eastern Division of the District of Idaho, LeRoy Mackay Simonson, with unlawful and fraudulent intent did transport or cause to be transported in interstate commerce from Malad City, Idaho, to Los Angeles, California, a forged and falsely made security, to-wit, an American Security Express Company Money Order, No. 292453, dated July 28, 1961, drawn on the Pacific State Bank, Windsor Hills Branch, Los Angeles, California, payable to Hugo Keller, in the sum of $45.00, signed Carl Keller as maker thereof and endorsed with the name Hugo Keller, and that the said LeRoy Mackay Simonson then knew that the signature of Carl Keller and the signature of Hugo Keller were

each falsely made and forged on said money order.

And the Grand Jury further charges:

That at the time and place first above mentioned, the defendant, EARL RIDDELL ELLIS wilfully knowingly and feloniously did aid, abet, counsel, induce and procure the commission of the above-described offense; this also in violation of Section 2314, Title 18, United States Code.

Trans. Vol I p.6 (Underlining ours)

It is at once to be observed that the pleader has used the exact words of the statute to charge the offense except he has added "wilfully, knowingly and feloniously".

Counts Two, Three and Four are essentially the same so far as pleading is concerned and hence we will treat them all the same for the purposes of this argument.

The Indictment was filed February 9, 1962 and the Appellant was brought before the Court on February 13, 1962 and filed his Motion to Dismiss all Counts in the Indictment for failure to comply with the minimum requirements of the Constitution of the United States Amendments Five and Six and Rule 7 of Federal Rules of Criminal Procedure.(Tr.Vol I p.11)

The Motion to Dismiss pointed out that no offense was charged against Appellant for the reason

"the offense is alleged to have been committed by others than the defendant but no allegations of fact are made as to how or in what manner, or when with certainty the defendant did aid, abet, counsel, induce and procure the commission of the alleged crime". The Motion to Dismiss was denied on February 14th, 1962. (Tr.Vol 1 p 27)

Thereafter the Appellant complained about this Indictment every chance that he had as we will point out herein.

We have in this Brief set out the Fifth and Sixth Amendments to the U. S. Constitution. See pgs. 2 and 3 this Brief. We refer to the Fifth Amendment because one of the tests of the sufficiency of an indictment is whether or not it is specific enough to prevent a second indictment for the same offense.

We rely on the Sixth Amendment to the Constitution because it requires that an accused has the right "to be informed of the nature and cause of the accusation.

Appellant further relies upon Rule 7 (c) of the Federal Rules of Criminal Procedure because it provides in its first sentence (p.3 this Brief) as follows:

> "The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

From a reading of the representative Count set forth above it is at once apparent that the entire paragraph dealing with Appellant does not state one fact from which Appellant could be advised of what the charge against him might be from a fact standpoint. The pleader and the indictment have been limited to nothing but legal conclusions.

It is impossible to determine from the indictment:

1. How the Appellant aided Simonson.
2. What the Appellant did to abet Simonson.
3. What the Appellant did to counsel or induce or procure the commission of Simonson's crime.

Not one essential fact is pleaded to show how Appellant in any way "aided", or "abetted" or "counselled", or "induced", or "procured" the commission of Simonson's crime.

Not one fact is alleged as to what the Appellant is supposed to have done.

This Honorable Court has recognized and approved the rule requiring Compliance with Rule 7 (c).

Current v. U.S. (CCA 9th 1961)287 F (2) 268.

Likewise the Supreme Court of the United States in the recent case of Russell v. U.S.(May 1962) 369 U.S. 749 8 L Ed (2) 240 had this to say:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,--it must descend to particulars.' "
United States v. Cruikshank, 92 US 542, 558 23 L ed 588, 593.

An indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him. . . is defective, although it may follow the language of the statute."
United States v. Simmons, 96 US 369, 362 24 L ed 819, 820.

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ."
United States v Carll, 105 US 611, 612, 26 L ed 1135.

"Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description with which he is charged."
United States v Hess, 124 US 483, 487, 31 L ed 516, 518, 8 S Ct 571.

See also Pettibone v United States, 148 US 197, 202-204, 37 L ed 419, 422, 423, 13 S Ct 542;
Blitz v United States, 153 US 308, 315, 38 L ed 725, 727, 14 S Ct 924;
Keck v United States, 172 US 434, 437, 43 L ed 505, 507, 19 S Ct 254;
Morissette v United States, 342 US 246, 270 Note 30, 96 L ed 288, 304, 72 S Ct 240.
Cf. United States v Petrillo, 332 US 1, 10, 11, 91 L ed 1877, 1884, 1885, 67 S Ct 1538.

That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

attention to the following decisions.

Meer v. U. S. (CCA 10th) 235 F(2) 65

Wright v U.S. (CCA 6th) 243 F. (2) 546

Ornelas v U.S. (CCA 9th) 236 F(2) 392

U. S. v. Debrow (1953) 346 U.S. 374 98 L ed 92

With respect to the fifth count in the indictment the charge is made that the Defendant-Appellant conspired with LeRoy Simonson and Nettie Ellen Simonson to do all the acts charged in the first four counts. Obviously, if the first four counts do not satisfy the requirements of the Sixth Amendment to the Constitution and Rule 7 (c) then the fifth count also fails to state any offense.

We believe that the above authorities and the rule set out in U.S. v. Strauss (CCA 5th 1960) 283 F (2) 155. support the proposition that count Five of the indictment failed to state an offense.

Footnote 6. on p 158 of the opinion reads as follows:

> "The mere charge that the acts done in connection with the conspiracy were in violation of the said statute. . . is not sufficient where, as here, the facts alleged fail to support such a charge which amounts to nothing more than the statement of a legal conclusion."

See also
U. S. v Cruikshank 92 US 542 23 L ed 588

Pettibone v U.S. 148 US 197 37 L ed 419

U. S. v Waddell 112 US 76 28 L ed 673

Pierce v U. S 252 US 239 64 L. Ed 542

II.

DEMAND FOR BILL OF PARTICULARS

The argument for a Bill of Particulars in this case is fundamentally based on the same ground as the Motion to Dismiss. We are well aware of the fact that if the Motion to Dismiss was well-taken there would be no basis for a Bill of Particulars. Our argument here is in the alternative and without concession to the Motion to Dismiss. This Motion was denied on February 14th 1962 and the Appellant immediately filed a Demand for a Bill of Particulars. He was striving in every way possible to ascertain the nature of the case against him so that he could prepare his defense.

The record shows that this Demand was not treated lightly by the trial judge in the first instance. He did not rule on it until October 10th 1962 a few moments before the trial commenced. (Tr. Vol I p. 89). At that time he denied it.

Appellant's counsel believe that if it can be said that the indictment can stand, then surely Appellant was entitled to a Bill of Particulars. When the charges of an indictment are so general as to fail to sufficiently advise the accused of the specific acts with which he is charged, the trial court has the power to order a Bill of Particulars under Rule 7 (f) of Federal Rules of Criminal Procedure.

From Appellants Memorandum Brief filed with the District Court on October 8th, 1962. (Tr Vol I pp. 77-84)the desperation of the Appellant and his counsel is apparent. They were about to go to trial and were not in possession of a single fact to show how it would be contended that Appellant actually violated the law. He was charged only with a series of legal conclusions. He had no answers to the questions of "how" "what", or in what manner he would be called upon to defend.

It cannot be disputed or argued that the Court had the power to order the Bill of Particulars.

U. S. v Tornabene 222 F (2) 875

Clay v U. S. 218 F (2) 483

U. S. v Debrow 346 US 374 98 L ed 92

Current v U. S. (CCA 9th 1961) 287 F(2) 268

Simpson v U. S. (CCA 9th 1960) 241 F(2) 222

It is no answer to a request for a bill of particulars for the Government to say that the defendant knows what he did and therefore has all the information necessary. The defendant is presumed to be innocent throughout all stages of the trial until proven "guilty" beyond a reasonable doubt. Therefore, he must be presumed to ignorant of the facts on which the charges are based BEFORE TRIAL.

Russell v U. S. (1962) 369 US 749 8 L ed (2)240

Cooper v U. S. (CCA 9th 1960)282 F(2) 527

Rodella v U. S. (CCA 9th 1960) 286 F(2) 306

U. S. v Smith (DC Mo 1954) 16 FRD 372

U. S. v Grieco (DC Ny 1960) 25 FRD 58

Thomas v U. S. (CCA 8th 1951) 188 F(2) 6

U. S. v Baker Brush Co. (DC Ny 1961) 197 F. Supp 922.

U. S. v Bentvena (DC Ny 1960) 1960) 193 F. Supp 435.

U. S. v Strauss (CCA 5th) 283 F(2) 155.

It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species or the particular character of the act.

"Generic" means general in application: Comprehending large classes: or having a large scope.

The terms "aid", "abet", "counsel" "induce" and "procure" are "generic" by their very nature. A moment's reflection for example on any of these words can produce a wide variety of imaginary applications.

The use of such words in an indictment can lend no "reasonable certainty" to the charge.

III.

ERRORS BEFORE AND AT THE TRIAL CONCERNING EVIDENCE

(a) It was highly prejudicial to the defense of this action to deprive the Appellant of access to

his books and records before the trial. From the record it appears that these books and records of Appellant were subpoenaed by a duces tecum served on witness Elmer Tarr December 26, 1961, by the Grand Jury. (Tr. Vol I p.34). Tarr by affidavit asserted a proprietary interest in records kept after December 1, 1961 (Tr Vol I pp. 37-38) George F. Zeal Deputy U. S. Marshall for the District of Idaho asserts by affidavit that upon instructions from Tarr, one Walter Dubble brought the records and documents in question to his office in Pocatello for safe-keeping and that he later surrendered them to Vernon Jensen a special agent of the Federal Bureau of Investigation for delivery to the U. S. Attorney in Boise. (Tr. Vol I pp. 35-36).

Appellant moved for the return of said books and records (Tr Vol I p. 16); supported by Appellant's Affidavit (Tr Vol I pp 17-23) including attached correspondence. The Motion was made on February 14th 1962. The Court denied the Motion a few moments before trial on October 10th 1962 with a provision that Appellant and Counsel might look at the records during the trial. (Tr Vol I p. 89).

This action on the part of the Court effectively prevented the Appellant from any efficient use of these voluminous records in preparing for trial. The records and documents included in the subpoena included:

1. Oak card file and all cards located in it.

2. Sales Tickets executed during the year 1961.

3. The original contract of sale of a 1957 Buick Sedan to LeRoy M. Simonson dated August 9th, 1962.

But all of the books and records of City Auto Sales were delivered to Mr. Zeal and Appellant has never received them yet at the time of the filing of this Brief.

We feel that this prevented the Appellant from having a fair trial and was in violation of Rule 16 Federal Rules of Criminal Procedure.

(b) The Appellant strongly objected to the admission in evidence of Plaintiff's Exhibit 2 which purported to be a photocopy of a record in North Dakota of the discharge papers of one Hugo Keller. The proceedings in connection with the identification and the foundation laid for admission of the Exhibit appear in the Transcript Vol Two pp.30-31. The Exhibit was objected to by Appellant on the specific grounds set forth in Specification of Error Number X of this Brief at page 16 hereof. It was objected to because it had no verity or probity whatever. It was not even certified.

Rule 44 of the Federal Rules of Civil Procedure is adopted by Rule 27 of the Federal Rules of Criminal Procedure as the standard for proof of documents and the Authentication thereof. For the convenience of the Court and Counsel this Rule is

set forth on pp.4-5 of this Brief.

An examination of the Exhibit and the record of its identification, authentication, and admission in evidence over the objection of the Appellant (Tr Vol II pp. 30-31)will show that it was error to admit this Exhibit.

It was also highly prejedicial in view the testimony of Simonson as to the use of the name "Hugo Keller" for identification in cashing the money orders and his assertion that he received the original discharge papers from Ellis and later destroyed them.

Passantino v U. S. (CCA 8th) 32 F (2) 116

Mullican v U. S. 252 F (2) 398

Wright v McDonald (Mo) 233 SW (2) 19

Schuyler v United Air Lines 94 F. Supp 472

In the Mullican case the Court held that copies of official records and documents cannot be properly admitted in evidence without substantial compliance with statute and rules and there was no such substantial compliance where certificate failed to show that copies, from which photo copies had been made were of themselves official documents or that they were true copies of originals and did not recite that individual purporting to authenticate photocopies had custody of ori inal documents or that he had official duties in political sub-division where records copied were kept.

(c) The Appellant did not have a fair trial for the reasons stated in (a) and (b) above and particularly where the conviction rested almost entirely on the uncorroborated testimony of two accomplices. The testimony of the accomplices was replete with conflicts, and inconsistencies. It was impeached by the numerous prior felony convictions of LeRoy M. Simonson. Tr Vol II pp.88-92. For the comparison of a few of the inconsistencies in the testimony of the accomplices please see Appendix I attached hereto in table form.

In view of their incredible story we feel that the Court should have instructed the Jury in the strongest language to distrust their testimony and to use the greatest of caution in considering it.

We are mindful of the rule in the Ninth Circuit as to there being no requirement for the corroboration of the testimony of an accomplice and which was so recently reiterated and approved in Toles v. U. S. No 17, 682 filed October 9 1962; Williams v U. S. No 17979 filed October 3, 1962; and White v U. S. which we understand was filed in the last few days.

We are also mindful of the older precedents which we have referred to under Point VII p. 21 of this Brief.

We do not wish to be disrespectful to the Court in any way in urging that in this case under all the circumstances a different rule might apply when taken into consideration with all of the other surrounding circumstances and the whole record of this trial.

This Court in considering an Appeal from Alaska (while still a Territory) under a statute requiring that the testimony of an accomplice be corroborated had no difficulty in sustaining such salutary rule in Stephenson v U. S. 211 F(2) 702 and in Ing v U. S. 278 F(2) 362.

In the Stephenson case the Court said:

> The Alaska statue to the effect that evidence of an accomplice is to be viewed with distrust was the question. The trial court failed to give an instruction on this point holding that defendant was not an accomplice of the Government's chief witness. This was held to be reversible error.
>
> The Court said: The logic and reasoning contained in the cases in jurisdictions following the minority rule has consideration appeal in view of the similar broad definition of "principals" contained in Sec. 2, Title 18 US Code, but under the circumstances of this case we find it unnecessary to rely thereon. The facts in the instant case bring it squarely within the exception to the general rule. The evidence, if true, was sufficient to show the existence of a conspiracy between witness Tester and appellant to commit the crimes of larceny and the receipt of stolen property, and thus fix the status of Tester as that of an accomplice so as to require the giving of cautionary instruction by the trial court. Tester's testimony came from a tainted source and was the character of evidence Congress considered unreliable and sought to protect against by Sec. 58-5-1. ACLA 1949 2.

The Court did not give an instruction as required by said Sec. 58-5-1, ACLA 1949, nor did appellant request such an instruction or except to the failure of the Court to so instruct. In a prosecution for violation of a law of the United States we held that under Alaskan law it was mandatory on the District Court to instruct as to the manner in which a jury should view the testimony of an accomplice. Anderson v United States, 9 Cir, 1946, 157 F(2) 429. Subsequent to the trial of the Anderson case, supra, Congress adopted the Federal Rules of Criminal Procedure, 18 USCA, and made them applicable in Alaska. Appellee argues that the Federal Rules of Criminal Procedure repealed Sec. 58-5-1 ACLA 1949. That section was enacted by Congress in 1900 and governs criminal trials in the Territory of Alaska. 31 Stat 438-439 (1900). Section 23, Title 48 USCA, provides in part that ". . . all laws in force in Alaska, prior to (August 24, 1912) shall continue in full force and effect until altered, amended, or repealed by Congress or by the (territorial)legislature." Section 58-5-1, ACLA 1949 has not been expressly altered, amended or repealed by either Congress or the territorial legislature. Nor do we find support for the argument that said section was impliedly altered, repealed or amended by the Federal Rules of Criminal Procedure.

We find no reference in said rules to the giving of cautionary instructions as to an accomplice's testimony. On the contrary the Alaska statute, requiring such an instruction is wholly consistent therewith and deals with a subject outside the scope and coverage of the Federal Rules of Criminal Procedure. In addition, the Federal Rules of Criminal Procedure seem to require the trial court to comply with the Alaska Statute.

The requirements of Sec. 58-5-1, ACLA 1949 being still in force and effect in criminal trials in Alaska, the case of Anderson v United States, 9 Cir, 1946, 157 F(2) 429, is controlling here. Under the circumstances of this case, the failure of the Court to give the accomplice testimony instruction is such plain error as to impel us to notice it under the provisions of Rule 52(b).,

Federal Rules of Criminal Procedure Title 18 USCA. From a reading of the whole record it affirmatively appears that such failure was highly prejudicial to appellant. Bihn v. United States 1946, 328 US 633, 66 S CT 1172, 90 L ed1485. The Government's case rested almost entirely upon the testimony of accomplice Tester, the thief. The jury should have had the benefit of the instruction in order to enable them to properly evaluate that testimony.

In the cited cases, this Court has pointed out all of the reasons in right and justice for the Application of the rule requiring corroboration of the testimony of an accomplice.

We respectfully hope that under the unusual circumstances of this case the application of the precedented rule might be modified.

IV.

EXCESSIVE SENTENCE

Appellant is aware of the precedent for upholding sentences in the federal court if within the limits of the penalties imposed by Congress in the statutes.

However, in this case, we have the unusual situation wherein three persons were charged with participation in the same offense. Each received a different sentence. Nettie Ellen Simonson, with no previous record, was placed on probation by the Court. As the wife of Simonson she was drugged with alcohol and beaten into participation in the crimes with which Simonson was charged. The District

Attorney even asked for leniency in her case although this fact does not appear in this record.

On the other hand Simonson who cashed the money orders and received the proceeds was sentenced to serve three years concurrently in a federal penitentiary on the counts to which he pleaded "guilty". His was a long and tawdry history of crime commencing in his youth and continuing over his entire adult life. At the time he was sentenced he was 57 years of age and through four felony convictions had shown no inclination to reform or to be rehabilitated.

The Appellant up until the time of his conviction in this case had never been convicted of a felony. He had honorably served his country in World War II and received an honorable discharge. He was a businessman in Pocatello, Idaho. Under these circumstances he was sentenced to serve 5 years in a federal penitentiary concurrently on all five counts and required to pay a fine of $5000.00 $1000.00 on each count.

The Court specifically required the Appellant to pay this fine before he could obtain bail pending this appeal. (Tr. Vol I p. 115) also in(Court minutes p. 114).

Appellant was unable to understand this sentence in any other light than that he was being penalized for having defended himself against the charges in the indictment.

This brings this case squarely within the authority of this Court to modify this sentence. Yates v U. S. 356 US 363 2 L ed (2) 837. U. S. v. Wiley (CCA 7th 1960)

In the Wiley case, the Court said:

> "Nor can the disparity in sentences imposed here be justified on the ground that Wiley asked for a trial. As we said in our former opinion, 267 F 2d at page 456:
> "* * * the defense certainly was not frivolous nor does it appear to have been presented in bad faith."
> Our part in the administration of federal justice requires that we reject the theory that person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

CONCLUSION

For the reasons set out herein we believe that the convictions of Appellant should be reversed. The reasons briefly stated being:

> 1. The indictments were fatally defective because they failed to comply with the minimum requirements of the Sixth Amendment and Rule 7 of the Federal Rules of Criminal Procedure. Each and every one of the Counts stated mere legal conclusions and no facts to apprise the appellant of the charges against him. In the absence of pleading any facts, the presumption of innocence also presumes the

accused ignorant of the circumstances stated in the charge.

2. In view of the denial of the Motion to Dismiss by the Court, the Bill of Particulars should have been allowed to at least define the generic terms and words used in the indictment. Accused was entitled to know what facts or circumstances were charged against him with some degree of certainty.

Respectfully Submitted,

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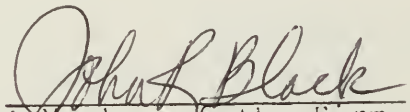

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APPENDIX I

The following is a brief summary and reference to several of the discrepancies, inconsistencies and outright conflicts in the testimony of LeRoy Simonson compared with his wife's testimony.

NETTIE ELLEN SIMONSON	LEROY SIMONSON
She testified in substance as follows:	He testified in substance as follows:
1. Vol.3 p249-251 Simonsons came from Three Forks, Montana to Pocatello, Idaho. via Butte Montana. They came straight through from Butte with stops for drinks only. No fishing.	1. Tr.Vol 3 p.98 That they fished and camped out over one or two nights on the trip from Montana to Idaho.
2. That she never heard any conversation between Appellant and her husband that Appellant would finance the trip. Tr Vol 3 p 260	2. That the Appellant stated he would finance the trip in the amount of $500.00. Tr. Vol2 pp 17 & 107
3. That when Appellant and Simonson went for a ride to obtain securities she remained in the office at car lot. Tr.Vol 3 p.257	3.That when Appellant and Simonson left for a ride to obtain securities Mrs. Simonson went to the house to lie down and rest.Tr. Vol 2 pp.19-20
4.That they stayed at a hotel the first night on arrival in Idaho. Tr.Vol 3.p253	4. That Simonsons went directly to Appellant's car lot on arrival in Pocatello, Idaho. Tr. Vol 2 p. 100

5.Appellant furnished liquor permit for identification only. Tr. Vol 3 p 262 & 269	5. Appellant furnished liquor permit and discharge papers of Keller. Tr.Vol 2 p112-115